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Supreme Court, U.S.
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No.

In the Supreme Court of the United States

October Term, 1994

DANIEL KAMIN, ROBERT KAMIN, HERMAN KAMIN AND DAVID SILVERBLATT,

Petitioners

vs.

T.L.C. SERVICES, INC.,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE DENIAL OF ALLOWANCE OF APPEAL BY THE PENNSYLVANIA SUPREME COURT

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STATEMENT OF THE QUESTION PRESENTED FOR REVIEW

Whether the Commonwealth of Pennsylvania's "Private Road Act" (36 Purdon's Statutes Section 2731, et seq.), which allows the taking of real estate for private use, deprives a property owner of equal protection of the law as mandated by the Fourteenth Amendment to the United States Constitution?

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PETITION

IN THE SUPREME COURT OF THE UNITED STATES

DANIEL KAMIN, ROBERT KAMIN, HERMAN KAMIN AND DAVID SILVERBLATT,

Petitioners

v.

T.L.C. SERVICES, INC.,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE DENIAL OF ALLOWANCE OF APPEAL BY THE PENNSYLVANIA SUPREME COURT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Paul D. Welch, Jr., Esquire, respectfully presents this Petition for Writ of Certiorari to the Denial of Allowance of Appeal by the Pennsylvania Supreme Court.

REFERENCE TO THE OPINIONS DELIVERED IN THE COURTS BELOW

The Pennsylvania Supreme Court, at the time of printing of this Petition, has not reported, officially or unofficially, its Order denying a Petition for Allowance of Appeal.

STATEMENT OF JURISDICTION

The Pennsylvania Supreme Court, by Order dated October 12, 1994, denied a Petition for Allowance of Appeal.

Under 28 U.S.C.A. Section 1257, final judgments or decrees rendered by the highest Court of a State in which a Decision could be had may be reviewed by the Supreme Court by Writ of Certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

STATEMENT OF THE CASE

On February 21, 1989, a Petition was filed by T.L.C. Services, Inc., before the Court of Common Pleas of Clinton County, Pennsylvania, under the Act of 1836, commonly known as the Private Road Act, 36 Purdon's Statutes Section 2731, et seq. The Petition requested that T.L.C. Services, Inc., be granted a right-of-way over private lands owned by Daniel Kamin, Robert Kamin, Herman Kamin, and David Silverblatt.

The Private Road Act allows for the Courts of Common Pleas in Pennsylvania, upon petition, to open a road across any lands of any person to a highway or place of necessary public resort.

A Board of View was appointed by the Court of Common Pleas of Clinton County, Pennsylvania. Said Board of View took testimony and viewed the premises. Thereafter, it filed a Report with the Court of Common Pleas of Clinton County indicating that a right-of-way was necessary and establishing the location thereof. Unfortunately, said right-of-way was established to run into, from a perpendicular angle, the entry way and exit of a shopping center owned by the Kamins and Silverblatt.

The Court of Common Pleas of Clinton County, Pennsylvania, dismissed the objections of the owners and, pursuant to the terms of the Act, established the width of the right-of-way. The owners questioned the constitutionality of said Act, this being the initial stage at which said questions were raised.

An appeal was timely filed to the Pennsylvania Commonwealth Court. By Decision dated March 16, 1994, said Court affirmed the judgment of the Court of Common Pleas of Clinton County and upheld the constitutionality of the Act.

A Petition for Allowance of Appeal was timely filed with the Pennsylvania Supreme Court. On October 12, 1994, said Court refused to hear the matter. Once again, the constitutionality of the Act was raised by appellants; however, it was not acted upon by the Pennsylvania Supreme Court.

REASONS FOR ALLOWANCE OF THE WRIT

Pennsylvania, early in its history, enacted legislation allowing for the establishment of private roads over land owned by one person for the benefit of another. Of course, the purpose of such roads was (and is) access to a public highway or places of necessary public resort. 36 Purdon's Statutes Section 2731.[1] Pennsylvania Courts have continuously recognized the right of the state legislature to enact such laws. *Waddell's Appeal,* 84 Pa. 90 (1877). The legislative authority stems not from the consideration of rights of individuals but the connection of these private ways with public highways, etc. *Id.* at 93-94. In essence, the constitutionality of the Act, at least at the state level, is predicated upon the power of the legislature to accomplish a purpose in which the general public has an interest.

Pennsylvania has also enacted an Eminent Domain Code. 26 Purdon's Statutes Section 1-101 *et seq.*[2] The Code contains procedural and substantive provisions for the taking of real property from individuals by governmental bodies. Of course, this condemnation must be for a public purpose. The intent of the Act is to provide the complete and exclusive procedural law governing these takings. *Id.* at Section 1-303.

Pennsylvania Courts have long recognized the constitutionality of legislative pronouncements on the subject. *McMasters v. Commonwealth,* 3 Watts Reporter 292 (1834). In fact, as early as 1681, William Penn, a proprietor of certain lands granted him by Charles II, indicated government had

[1] See Appendix for full text of the legislation, known commonly as the Private Road Act.

[2] See Appendix for applicable provisions of Pennsylvania's Eminent Domain Code.

the power to "settle and order" by "modalling" streets, necessary roads and highways in the province. Duke of Yorke's Book of Law, p. 95.

Thus, Pennsylvania has two legislative enactments for taking of private property. One law, the Private Road Act, allows for the taking by private individuals of the land of another for establishing access to his/her premises. The other law allows for the taking of private property by governmental bodies. Unfortunately, for those individuals who are subject to the Private Road Act, the available procedures and safeguards are not equal/comparable to those contained in the Eminent Domain Code.

As this Honorable Court is well aware, Section One of the Fourteenth Amendment to the U. S. Constitution forbids states from denying persons equal protection of its laws. The essence of this clause is the requirement that similarly situated people be treated alike. *City of Cleburne v. Cleburne Living Center,* 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed. 2d 313 (1985). It is Petitioners' contention that the Pennsylvania statutes do not treat similarly situated property owners in like manner and, more particularly, that Pennsylvania's Private Road Act accords fewer rights, both procedurally and substantively, than Pennsylvania's Eminent Domain Code.

It is important to note that Petitioners are *not* arguing that the statute in question deprives them of due process under the Fifth Amendment to the Constitution. They are well aware that this Honorable Court has found that:

> 1. Condemnation by one person for his individual use of a right-of-way over the land of another for the construction of an irrigation ditch is not prohibited;

2. The right-of-way over the land of another for an aerial bucket line is not violative of the Fifth Amendment; or

3. The right to flood the land of another by the erection of a dam is not prohibited.

Clark v. Nash, 198 U.S. 361, 25 S.Ct. 676, 49 L.Ed. 1085 (1905); *Strickley v. Highland Boy Goldmining Company,* 200 U.S. 527, 26 S.Ct. 301, 50 L.Ed. 581 (1906). In addition, Petitioners acknowledge that this Honorable Court has deferred to the Decisions of State Courts in their determination of the uses for which land could be taken, given the diversity of local conditions. *Hairston v. Danville & Western Railway Company,* 208 U.S. 598, 28 S.Ct. 331, 52 L.Ed. 637 (1908).

The key, whether the taking be by private individual or governmental entity, is that there must be a determination that a "public use" was involved. This Honorable Court has made it clear that it will defer to a legislature's "public use" determination until it is shown to involve an impossibility. *Furman v. Parker,* 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 2d 27 (1954).

Of course, this Honorable Court has also held that where there was a taking of private property and it was not shown or claimed to be for a public use, such taking was invalidated for lack of justification. *Missouri Pacific R. Co. v. Nebraska,* 164 U.S. 403, 17 S.Ct. 130, 41 L.Ed. 489 (1896). Otherwise, where the exercise of eminent domain power is rationally related to a conceivable public purpose, the Court has never proscribed a compensated taking. *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229, 104 S.Ct. 2321, 81 L.Ed. 2d 186 (1984).

In the instant matter, however, the Court need not even determine the "public purpose" issue. The matter is strictly one of comparing two statutes which affect similarly situated individuals, i.e., property owners, in different ways dependent

upon whether the taking is done by a private individual or a governmental body.

Of course, legislatures have wide discretion in passing laws that have the inevitable effect of treating some people differently from others and legislative classifications are valid unless they bear no rational relationship to a permissible state objective. *N.Y.C. Transit Authority v. Beazer,* 440 U.S. 568, 99 S.Ct. 1355, 59 L.Ed. 2d 587 (1979). Nonetheless, this Honorable Court has carved out a significant exception to this long-established rule. That exception, known as the "compelling interests test" has two (2) branches. The first branch involves classifications based upon "suspect" criteria, *Harper v. Virginia Board of Elections,* 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed. 2d 169 (1966). The second branch of the "compelling interests" principle involves statutory classifications which may affect a "fundamental right", regardless of the basis of the classification. *Skinner v. Oklahoma,* 315 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942).

Petitioners contend that, under Pennsylvania's Private Road Act, they are treated differently than individuals who have their property taken by governmental entities. In both instances, a person's property is, in essence, condemned. Under the Fifth Amendment to the Constitution, property is not to be taken without due process of law or without just compensation. Therefore, Petitioners respectfully submit that the Court should strictly scrutinize Pennsylvania's Private Road Act to see whether there is a compelling state interest in not providing the same protections accorded those individuals who have property taken pursuant to Pennsylvania's Eminent Domain Code.

Even if the Court were to determine that a fundamental right or suspect criteria are not involved, it is still Petitioners' position that no legitimate governmental objective is served by

according fewer rights to an owner of property condemned by a private individual as opposed to that condemned by governmental entity.

In essence, the Private Road Act allows a private citizen to exercise eminent domain power. Unlike Section 1-401 of the Eminent Domain Code, however, the Private Road Act does not require that a condemnor give security by filing a bond with the Declaration of Taking. The purpose of the bond is to protect the owner from any damages he incurs as a result of such taking. Obviously, the Private Road Act does not protect the owner of the servient tenement from same.

Expenses, including legal fees incurred in defending the action and expert witness fees required to rebut any valuation testimony offered by the private condemnee(s), are not reimbursable under the Private Road Act. Nonetheless, Pennsylvania's Eminent Domain Code, Section 1-610, provides for payment of certain of these fees.

Under either statute, proceedings could drag on for years (as in the instant matter) until a final determination of damages is made. The Private Road Act does not provide for compensation in the event of delay. Yet the Eminent Domain Code, Section 1-611, provides for payment of a percentage (6%) of the property's value for any procrastination.

Where an owner of the dominant tenement determines that he/she is unwilling or unable to pay the damages awarded by a Court (or Board of View) and, therefore, simply revokes or terminates the proceedings, there is no provision for compensation to the owner of the servient tenement. In essence, the condemnor can just "walk away" from the matter. On the other hand, Pennsylvania's Eminent Domain Code, Section 1-408, provides for reimbursement by the condemnor for reasonable appraisal, attorney and engineering fees, along with other costs and expenses actually incurred because of the

proceedings. Without this provision and without the requirement of any bond, the servient tenement owner in a Private Road Act proceeding has no recourse to recoup expenses, to say nothing of the time and aggravation involved.

Moreover, the lack of requirement of security, through a bond, would certainly hinder the transferability of the servient tenement in a Private Road Act proceeding, because a prospective purchaser would never know whether the owner of the dominant tenement was going to follow through with his/her petition and exercise his/her rights granted by the statute. Such is not the case under Pennsylvania's Eminent Domain Code. In essence, this lack of security results in a chilling effect upon the marketability of the servient tenement.

If a petition is filed under the Private Road Act, there is no indication what rights an intervening creditor might have. For example, if a determination of compensation were made but payment never forwarded, a cloud upon the title to the servient tenement would remain until such time as the compensation was paid. Pending same, an intervening creditor would have no knowledge as to where it stood vis-a-vis priority of any lien it may hold. The Eminent Domain Code provides for title to vest with the condemnor at the time of the filing of the Declaration of Taking. This eliminates any concern. See Section 1-402 of Pennsylvania's Eminent Domain Code.

Procedurally, Pennsylvania's Eminent Domain Code allows a condemnee to file preliminary objections to a taking. Under Section 1-406 a person can challenge the power/right of the condemnor to appropriate the condemned property, the sufficiency of the security, any other procedure followed by the condemnor or the Declaration of Taking itself. No such provision is available under the Private Road Act. Consequently, there is no means to initially challenge a taking and

avoid a long, drawn out process involving a Board of View, Court hearing, etc.

Petitioners believe that the Eminent Domain Code affords landowners certain rights which are not given to the same landowners under the Private Road Act. In essence, a "private" taking does not invoke certain procedural and substantive rights which a person is entitled to receive if there is a governmental taking. No legitimate governmental objective is served by differentiation between the two.

CONCLUSION

In the instant matter, the Pennsylvania Supreme Court refused to address the important question of whether Pennsylvania property owners' rights under the Fourteenth Amendment have been affected by the unequal procedures involved in the two legislative enactments of the Pennsylvania General Assembly. Therefore, Petitioners respectfully request this Honorable Court to grant certiorari, consider Petitioners' equal protection argument, and determine that Pennsylvania's Private Road Act impermissibly creates a separate class of owners subject to "private" takings, who are not afforded the same rights as those subject to Pennsylvania's Eminent Domain Code.

Respectfully submitted,
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IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 156 M.D. Alloc. Dkt. 1994

Petition for Allowance of Appeal from Order of the Commonwealth Court

T.L.C. SERVICES, INC.,

Respondent

v.

DANIEL KAMIN, ROBERT KAMIN, HERMAN KAMIN AND DAVID SILVERBLATT,

Petitioners

ORDER

PER CURIAM

AND NOW, this 12th day of October, 1994, the Petition for Allowance of Appeal is Denied.

Mr. Justice Montemuro is sitting by designation.

A True and Correct Copy
Attest: 10/13/94
/s/Joan L. Stehulak, Esquire
Deputy Prothonotary

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 1628 C.D. 1993

T.L.C. SERVICES, INC.

v.

DANIEL KAMIN, ROBERT KAMIN, HERMAN KAMIN, and DAVID SILVERBLATT,

Appellants

ORDER

NOW, March 16, 1994, the order of the Court of Common Pleas of Clinton County in the above-captioned matter is hereby affirmed.

/s/Joseph T. Doyle, Judge

Certified From The Record
And Order Exit
Mar 16 1994
/s/C.R. Hostutler
Deputy Prothonotary—Chief Clerk

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 1628 C.D. 1993
Argued: December 15, 1993

T.L.C. SERVICES, INC.

v.

DANIEL KAMIN, ROBERT KAMIN, HERMAN KAMIN, and DAVID SILVERBLATT,

Appellants

BEFORE: HONORABLE DAVID W. CRAIG, President Judge
HONORABLE JOSEPH T. DOYLE, Judge
HONORABLE JAMES GARDNER COLINS, Judge
HONORABLE DORIS A. SMITH, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge

OPINION BY JUDGE DOYLE
FILED: March 16, 1994

Daniel Kamin, Robert Kamin, Herman Kamin, and David Silverblatt (collectively, the Kamins) appeal an order of the Court of Common Pleas of Clinton County which affirmed the report of a Board of View laying out a private road over the Kamins' property pursuant to the Act of June 13, 1836, P.L. 551, *as amended*, 36 P.S. §§2731-2891, commonly known as the Private Road Act (Act).

This litigation began on February 21, 1989, when T.L.C. Services, Inc. (TLC) filed a petition pursuant to Section 11 of the Act, 36 P.S. §2731, requesting that a Board of View be appointed to lay out a private road over the Kamins' property for the benefit of TLC, which owned adjoining property. TLC sought a private road because its property adjoining the

Kamins' property is so situated as to provide no means of egress or ingress to a highway.

The Act of 1836 provides, in relevant part, and in the language of the day:

> The several court of quarter sessions shall, in open court as aforesaid, upon the petition of one or more persons, associations, partnerships, stock companies, or corporations, for a road from their respective lands or leaseholds to a highway or place of necessary public resort, or to any private way leading to a highway, ... direct a view to be had of the place where such road is requested, and a report thereof to be made. ...

Section 1 of the Act, 36 P.S. §2731.

The Act further provides that:

> If it shall appear by the report of viewers to the court directing the view, that such road is necessary, the said court shall direct what breadth the road so reported shall be opened, and the proceedings in such cases shall be entered on record, as before directed, and thenceforth such road shall be deemed and taken to be a lawful private road.

Section 12 of the Act, 36 P.S. §2732. The Board of View determined that a private road was, indeed, necessary to allow TLC access from its property to a highway, and that the location of the road proposed by TLC was the least intrusive location on the Kamins' property. Accordingly, the Board of View established the road's location in accordance with TLC's request.

Pursuant to Section 12 of the Act, 36 P.S. §2732, the trial court conducted a hearing to determine the width of the private road. Before the trial court, the Kamins argued that the Act is unconstitutional in that it allows for a taking of

private property without adequate compensation and sufficient due process in violation of the Fourteenth Amendment of the United State Constitution,[1] and Article I, Section 10 and Article X, Section 4 of the Pennsylvania Constitution.[2] The trial court held that the Act was constitutional, and set the width of the private road and limitations on the travel upon it. This appeal followed.

On appeal, the Kamins argue that the Act is "unconstitutional in that it fails to provide a condemnee with due process and equal protection of the laws to which a condemnee would be entitled under the Pennsylvania Eminent Domain Code."[3] Essentially, the Kamins argue that the condemnee is not sufficiently protected under the Act from damages and deprivation of property because the Act does not require the posting of a bond by the condemnor.

Article I, Section 10,[4] of the Pennsylvania Constitution provides that:

> [N]or shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured.

Article X, Section 4,[5] provides:

> Municipal and other corporations invested with the privilege of taking private property for public use shall make just compensation for property taken, injured or destroyed by the construction or enlargement of their works, highways or improvements and compensation

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[1] U.S. Const. Amend. XIV.
[2] Pa. Const. Art. I, §10; Art. X, §4.
[3] Act of June 2, 1964, Special Sess., P.L. 84, *as amended*, 26 P.S. §§1-101—1-903.
[4] Pa. Const. Art. I, §10.
[5] Pa. Const. Art. X, §4.

> shall be paid or secured before the taking, injury or destruction.

The Fourteenth Amendment to the U.S. Constitution similarly prohibits state action which deprives a person of property without due process of law or deprives a person of the equal protection of the law. U.S. Const. Amend. XIV.

The Act, however, does provide for the full payment of damages to the owners of property over which private roads are laid out before the road is actually opened. Section 2 of the Act provides that:

> The damages sustained by the owners of the land through which any private road may pass shall be estimated in the manner provided in the case of a public road, and shall be paid by the persons, ... at whose request the road was granted or laid out: *Provided, That no such road shall be opened before the damages shall be fully paid.*

36 P.S. §2736 (emphasis added). This provision of the Act provides assurance that the property will not be physically taken prior to compensation.

Contrary to the Kamins' arguments, the Act has been consistently held to be constitutional and in compliance with the requirements of due process embodied in both the Pennsylvania Constitution and the United States Constitution. *Dickinson Township Road,* 23 Pa. Superior Ct. 34 (1903); *Pocopson Road,* 16 Pa. 15 (1851); *see also, Marinclin v. Urling,* 262 F. Supp. 733 (W.D. Pa.) *aff'd,* 384 F.2d 872 (3d Cir. 1967) (Act does not violate the Fourteenth Amendment to the U.S. Constitution). Although the Kamins correctly note that a panel of the Superior Court in *In re Laying Out and Opening A Private Road,* 405 Pa. Superior Ct. 298, 309, 592 A.2d 343, 349 (1991), held that allowing a private citizen to exercise eminent domain power through the Act may raise constitutional implications, that decision did not hold that the Act was unconsti-

tutional, nor could it overrule *Pocopson Road,* a very early Supreme Court decision. We, therefore, reject the Kamins' first argument.

The Kamins further contend that the Act is constitutionally deficient by not requiring the condemnor to post a bond, because the Act does not otherwise protect a condemnee from damages from the following: (1) The costs of litigating the laying out of the road where the condemnor abandons the action before paying compensation; (2) the impediment to the marketability of the property while the proceedings are pending; and (3) the sale of the dominant tenement or the bankruptcy of the owner of the dominant tenement. In contrast to the Act, Section 403(a) of the Eminent Domain Code, 26 P.S. §1-403(a), requires that "every condemnor shall give security to effect the condemnation by filing with the declaration of taking its bond, without surety, to the Commonwealth of Pennsylvania for the use of the owner or owners of the property interests condemned. ..."

The Kamins' arguments are similar to those raised by the condemnee in *Pocopson Road,* who argued that under the Act:

> The obligation of the parties is not mutual, inasmuch as one party is bound to have the road opened through his property after its confirmation and assessment of damages, and the other party has the option whether to cause it to be opened and pay the damages or not.

Pocopson Road, 16 Pa. at 18. The Supreme Court rejected the condemnee's argument that the Act is unconstitutional because it does not shield a condemnee from all potential expenses associated with such proceedings or provide for mutuality of remedies, in that the condemnor is in a better bargaining position than the condemnee. To the extent that the Kamins raise the same issue, we reject their same argument. The alleged inequity is better addressed by the legislature and cannot form the basis of a constitutional challenge to the

legality of the Act. Furthermore, the Kamins have asserted no real present circumstances that place them in threat of such potential harm. Their entire argument is in the abstract.

In answer to the Kamins' argument that the Act does not provide the same framework of constitutional protection for the condemnee as does the Code, although we have held that proceedings under the Act are in the nature of eminent domain proceedings, *Mandracchia v. Stoney Creek Real Estate Corp.*, 148 Pa. Commonwealth Ct. 80, 609 A.2d 871 (1992), we have held that the provisions of the Code do not apply to the Act. *Mattei v. Huray*, 54 Pa. Commonwealth Ct. 561, 422 A.2d 899 (1980). It is not the role of this Court to superimpose the requirements of the Code upon the Act in light of the legislature's clear intention that the provisions of the Code not affect the Act,[6] regardless of whether we agree with the Superior Court's encouragement of legislative reform of the Act. *See In re Laying Out a Private Road*, 405 Pa. Superior Ct. at 309, 592 A.2d at 349. We must, therefore, reject the Kamins' argument that the Act is constitutionally deficient for failing to require the condemnor to post a bond before instituting proceedings under the Act.

Based on the foregoing discussion, we affirm the order of the trial court.

/s/Joseph T. Doyle, Judge

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[6] The comment to Section 511 of the Eminent Domain Code, 26 P.S. §1-511, states:

> There are also a number of statutes requiring the viewers to make findings as to the necessity of a private road or the location of utility lines, etc. (Finding as to necessity of private roads, see Act of 1836, June 13, P.L. 551, §12 (36 P.S. §2732)). ***These statutes are not repealed or affected by this act.***

Comment-Joint State Government Commission 1964 Report to Section 511 of the Code, 26 P.S. §1-511 (emphasis added). Clearly the legislature intended that the provisions of the Code not affect the Act.

IN THE COURT OF COMMON PLEAS OF CLINTON COUNTY, PENNSYLVANIA
CIVIL ACTION—LAW

NO. 28-89 (MISC.)

T.L.C. SERVICES, INC.,

Plaintiff

vs.

DANIEL G. KAMIN, ROBERT S. KAMIN, HERMAN KAMIN and DAVID SILVERBLATT,

Respondents

OPINION AND ORDER

Re: Plaintiff's Request to Establish Width of Private Road

ARGUMENT: April 29, 1993—1:30 P.M.—Courtroom No. 1.

APPEARANCES: Robert H. Lugg, Esq., Lock Haven, Pennsylvania, for Plaintiff.
J. Michael Williamson, Esq., Lock Haven, Pennsylvania, for Defendants.

This is a proceeding that began to set the width of a private road laid out by a Board of View over the property of Defendants pursuant to 36 Pa.C.S. §2731. However, Defendants have raised two additional issues, these being whether 36 Pa.C.S. §2731 is unconstitutional under either the Fourteenth Amendment of the United States Constitution or under Article 1 Section 10 or Article 10 Section 4 of the Pennsylvania Constitution and "[w]hether a court may impose limitations upon the use of a private right-of-way granted under the provisions of said Act." (Defs.' Mem. of Law at 1.)[1]

[1] In their "Response to Request to Establish Width of Private Road" and at argument Defendants also claimed that the private road would violate a current

A brief history of the case is necessary to understand the nature of the current proceeding. Plaintiff secured the laying out of a private road intersecting with Route 150 over property belonging to Defendants. Defendants filed Exceptions to the Board of View's Report that set forth this result;[2] said exceptions were dismissed by the Court. The instant proceeding, as has been stated, was initiated in order to have the Court determine the width of the private road.

Nevertheless, Defendants have raised the two aforementioned issues regarding the constitutionality of 36 Pa.C.S. §2731 and the Court's power thereunder. The Court will address each issue.

While takings of private property for private use "may raise constitutional implications," *In re Laying Out and Opening a Private Road,* 405 Pa. Super. 298, 309, 592 A.2d 343, 349 (1991), the same is not necessarily true of takings of private property for public use. Therefore, under the provisions of the Pennsylvania and United States Constitutions cited by Defendants, a threshold inquiry is whether takings of property under 36 Pa.C.S. §2731 constitute takings of property for public use.

With regard to 36 Pa.C.S. §2731 it has been held that acquisitions of property thereunder can be characterized as takings of private property for public use because private roads laid out under the statute provide access to public highways for owners of land who would not otherwise have access to the latter and provide access for the general public[3] to the property

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lease between Defendants and the owner of a nearby car dealership. Defendants therefore claimed that the lessee needed to be joined as an indispensable party to this action. However, since Defendants have not elaborated on this claim in their Memorandum of Law, the Court will not consider it further.

[2] The Board of View was composed of surveyor H. Richard Ohl, Thomas H. Jeffries, and Craig P. Miller, Esq., its chairman.

[3] It has been held that "public use should be broadly defined when the use benefits the Commonwealth [of Pennsylvania]." *Hughes v. Consol-Pennsylvania Coal Co.*, 945 F.2d 594, 613 (3d Cir. 1991), *cert. denied*, 112 S. Ct. 2300 (1992). Takings of property under 36 Pa.C.S. §2731 clearly benefit the Commonwealth

of landowners benefited by private roads. *See Palairet's Appeal,* 67 Pa. 479, 491-92 (1871) (opinion of Sharswood, J.); *see also Waddell's Appeal,* 84 Pa. at 93; *In re Laying Out and Opening of a Private Road,* 405 Pa. Super. at 303, 592 A.2d at 346 ("[t]he opening of such ... road[s] [under 36 Pa.C.S. §2731] provides access to ... public highway[s].") This rationale has been upheld to the present day as both the Commonwealth Court and the Superior Court have opined that takings under 36 Pa.C.S. §2731 are "in the nature of ... eminent domain proceeding[s]," *In re Laying Out and Opening a Private Road,* 405 Pa. Super. at 308, 592 A.2d at 349; *Mandracchia v. Stoney Creek Real Estate Corp.,* Pa. Commw. , 609 A.2d 871 (1992), and " '[e]minent [d]omain' has been defined as *'[t]he power to take private property for public use* by the state, municipalities, *and private persons or corporations authorized to exercise functions of public character,"*[4] *In re Laying Out and Opening a Private Road,* 405 Pa. Super. at 303, 592 A.2d at 346 (quoting *Black's Law Dictionary,* 5th Ed., p.470 (emphasis added).

Therefore, having determined that acquisitions of real property pursuant to 36 Pa.C.S. §2731 are takings of private property for public use, it remains for the Court to address Defendants' arguments regarding the constitutionality of the statute under the Pennsylvania and United States Constitutions.

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because of the increased use of the Commonwealth's public highways such takings create. For other reasons why takings under 36 Pa.C.S. §2731 are takings of private property for public use, see *Marinclin v. Urling,* 262 F.Supp. 733 (W.D. Pa.), *aff'd.,* 384 F.2d 872 (3d Cir. 1967).

Further, even though takings that establish private roads unquestionably benefit private citizens (i.e. the owners of properties to which such roads lead), such a fact does not make these takings lose their public character. *See Hughes v. Consol-Pennsylvania Coal Co.,* 945 F.2d at 613 (interpreting Pennsylvania law); *see also Waddell's Appeal,* 84 Pa. 90, 94 (1877).

[4] I.e. through statutes such as 36 Pa.C.S. §2731.

To begin with, it has been held that the statute clearly passes muster under the Fourteenth Amendment to the United States Constitution. *Marinclin v. Urling*, 262 F. Supp. at 736. Thus, Defendants' argument to the contrary is rejected.

Likewise, Defendants' contention that the statute is unconstitutional under either Article 1 Section 10 or Article 10 Section 4 of the Pennsylvania Constitution must be rejected. The main thrust of Defendants' argument is the lack of a requirement under 36 Pa.C.S. §2731 that a bond be posted to secure the payment of damages allegedly violates the specific language of the aforementioned constitutional provisions.[5] The Court disagrees. 36 Pa.C.S. §2736, which governs the payment of damages under 36 Pa.C.S. §2731 takings, contains a proviso stating that no private road laid out under §2731 is to be opened before damages are fully paid to condemnees. *See also In re Laying Out and Opening a Private Road*, 45 [sic] Pa. Super. at 308, 592 A.2d at 348. Hence, private road takings do not in effect become final until damages have been paid, and for this reason 36 Pa.C.S. §2731 is not unconstitutional under either Article 1 Section 10 or Article 10 Section 4 of the Pennsylvania Constitution.

Defendants go to great lengths to point out the alleged lack of procedural safeguards (for purposes of due process) available when land is taken for the laying out of private roads, according to *In re Laying Out and Opening of a Private Road*. However, when the taking process for establishing private roads is discussed in that case, it is compared to procedures

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[5] Article 1, Section 10 states in pertinent part that private property shall not "be taken or applied to public use, without authority of law *and without just compensation being first made or secured*" (emphasis added). Article 10 Section 4 states that "[m]unicipal and other corporations invested with the privilege of taking private property for public use shall make just compensation for property taken, injured or destroyed by the construction or enlargement of their work, highways or improvements *and compensation shall be paid or secured before the taking, injury or destruction*" (emphasis added).

under the Eminent Domain Code, 26 Pa.C.S. §1-101—1-903. As even Defendants admit, it is unclear at present as to whether the Eminent Domain Code applies to private road takings. *Compare In re Laying Out and Opening of a Private Road with Mandracchia.* Thus, the Court is not convinced that the Superior Court in *In re Laying Out and Opening of a Private Road* was commenting negatively on private road taking procedures themselves. On the contrary, it seems to the Court that the Superior Court was merely comparing these procedures to like procedures under the Eminent Domain Code. Moreover, nowhere does the Superior Court articulate that the taking process for laying out private roads is constitutionally deficient for want of due process.

For all of the above reasons, then, the Court finds that 36 Pa.C.S. §2731 is not unconstitutional under either the United States Constitution or the Pennsylvania Constitution.

With regard to Defendants' contention that the Court is without power to regulate the manner of the use of a private road by the dominant tenement, the Court would point out that although 36 Pa.C.S. §2731 does not explicitly give the Court the power to do so, such power is implicit in the statute. The use of a private road "is such as the public may have in the ordinary use of a public highway." Consequently, it has been held in at least one case that a private entity endeavoring to utilize a laid-out private road for its own "special use" could not do so. *Philadelphia Clay Co. v. York Clay Co.*, 241 Pa. 305, 313, 88 A. 487, 489 (1913). Thus is [sic] would seem to the Court that it may regulate and if necessary proscribe any use of a laid-out private road that is inconsistent with the general everyday use of a public highway. The Court also reminds Defendants that it may conceivably regulate the use of a private road if an action in nuisance is ever filed involving the road. *See Firth v. Scherzberg*, 366 Pa. 443, 77 A.2d 443 (1951).

In the present case, it was suggested that tractor trailers and/or buses if travelling over the private roadway might have difficulty maneuvering on the right-of-way. It is true that the testimony of Mike Harbaugh (Plaintiff's owner) established that no tractor trailer trucks would make deliveries to Plaintiff's property (which Mr. Harbaugh stated would be used for a miniature golf course) and it is also true that any bus traffic on the private roadway would obviously be consistent with the everyday use of most public highways (i.e. buses, ***inter alia,*** routinely travel on most public highways).

However, not all public highways may be used by all types of traffic. A limited access highway, which is a public road "to which owners or occupants of abutting property or the travelling public have no right of ingress or egress to, from or across such [road], except as may be provided by the authorities responsible therefor," 36 Pa.C.S. §2391.1, is similar in character to the private road in this case. Further, those responsible for the maintenance of limited access highways may proscribe "any class or kind of traffic therefrom." 36 Pa.C.S. §2391.9. Thus, by analogy, since private roads laid out under 36 Pa.C.S. §2731 must be maintained by those who request their laying out, 36 Pa.C.S. §2735, it would seem that in the instant case Plaintiff may exclude certain kinds of public traffic from its road. Consequently, Mike Harbaugh has indicated that the everyday use of Plaintiff's private roadway would be limited to single-axle vehicles. (Br. in Supp. of Pl.'s Req. to Establish the Right of Way's Width at 3.)

Given all of the above, given the Court's earlier conclusion that it can regulate and/or proscribe any use of a private road that is inconsistent with the everyday use of a public highway, and given Defendants' concerns about tractor-trailer and bus traffic on the private roadway, the Court will limit the use of the right-of-way to single-axle vehicles.

At this point the Court will establish the width of the private roadway. Preliminarily, though, it must address Defendants' contention that with respect to the portion of the roadway that runs parallel to Route 150, "[d]espite any observation to the contrary during the hearing, [Defendants] believe [ ] the Court is bound by the twenty (20) foot width requested by [Plaintiff] and cannot expand the requested relief." (Defs.' Mem. of Law at 6.) The Court is not precisely sure why Defendants so contend as Plaintiff agrees (and its survey attached to its "Request to Establish Width of Private Road" in fact states) that the width of the portion of the roadway running parallel to Route 150[6] should be twenty (20) feet. If in reality it is Plaintiff's proposed sixty (60) foot width of the first course with which Defendants are concerned, by their own argument Defendants are bound by this width since it too is listed on the aforementioned survey and was thus part of Plaintiff's originally-requested relief.

Consequently, the Court fixes the width of the roadway as defined on Plaintiff's survey as follows: the first course beginning at the center point of Route 150 is to be sixty (60) feet wide; the second course, running parallel to Route 150, is to be twenty (20) feet wide.

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[6] In other words, the second course of the right-of-way.

IN THE COURT OF COMMON PLEAS OF CLINTON COUNTY, PENNSYLVANIA
CIVIL ACTION—LAW

NO. 28-89 (MISC.)

T.L.C. SERVICES, INC.,

Plaintiff

vs.

DANIEL G. KAMIN, ROBERT S. KAMIN, HERMAN KAMIN and DAVID SILVERBLATT,

Respondents

ORDER

AND NOW, June 15, 1993, based on the foregoing Opinion IT IS HEREBY ORDERED that:

(1) Defendants' arguments regarding the constitutionality of 36 Pa.C.S. §2731 and the Court's power to regulate the uses of rights-of-way laid out thereunder are dismissed.

(2) The width of the right-of-way in the present case as it traverses lands of Defendants as shown on the survey of Fred Henry, R.S., dated March 1, 1993, which survey is incorporated herein and attached hereto, is sixty (60) feet along the first course and twenty (20) feet along the second course.

(3) The use of the right-of-way in the present case shall be limited to single-axle vehicles.

BY THE COURT:
/s/C.V. Brown, P.J.

PRIVATE ROAD ACT

§2731. Proceedings to open private roads

The several courts of quarter sessions shall, in open court as aforesaid, upon the petition of one or more persons, associations, partnerships, stock companies, or corporations, for a road from their respective lands or leaseholds to a highway or place of necessary public resort, or to any private way leading to a highway, or upon the petition of the chief executive officer of any executive or administrative department of the State Government for a road from any public highway across any lands of any person, association, or corporation to the boundary line of any lands owned, controlled, or administered by the Commonwealth, direct a view to be had of the place where such road is requested, and a report thereof to be made, in the same manner as is directed by the said act of thirteenth June, one thousand eight hundred and thirty-six.[1] 1836, June 13, P.L. 551, §11; 1901, April 4, P.L. 65, No. 32, §1; 1927, April 28, P.L. 485, §1. [Footnote omitted.]

§2732. Proceedings on report of viewers

If it shall appear by the report of viewers to the court directing the view, that such road is necessary, the said court shall direct what breadth the road so reported shall be opened, and the proceedings in such cases shall be entered on record, as before directed, and thenceforth such road shall be deemed and taken to be a lawful private road.

§2733. Gates

In all cases of a private road, it shall be lawful for the owners of the land over which the same may be laid out or authorized, to apply to the court aforesaid for leave to hang and maintain at their own expense, swinging gates across the road, and thereupon the court shall direct the viewers ap-

pointed to view such road, or in case the road has been already laid out, may appoint other viewers in manner aforesaid, to inquire and report whether the same may be done without much inconvenience to the persons using such road. 1836, June 13, P.L. 551, §13.

§2734. When gates shall be erected

If it shall appear to the court that a gate or gates may be hung as aforesaid, according to the prayer of the party, without much inconvenience to the person or persons using such road, they shall decree accordingly, and in such decree they shall order and direct that such gate or gates be made and kept in repair, and made easy for passing, by the respective owners of said land. 1836, June 13, P.L. 551, §14.

§2735. Repair of private roads

All private roads shall be opened, fenced and kept in repair by and at the expense of the person or persons respectively at whose request the same were granted and laid out, and by their heirs and assigns.

§2736. Damages

The damages sustained by the owners of the land through which any private road may pass shall be estimated in the manner provided in the case of a public road, and shall be paid by the persons, associations, partnership, stock companies, corporations, or executive or administrative department of the Commonwealth at whose request the road was granted or laid out: Provided, That no such road shall be opened before the damages shall be fully paid. 1836, June 13, P.L. 551, §16; 1927, April 28, P.L. 485, §2.

§2737. Private roads; limit of time for opening

Whenever proceedings. have been heretofore or may hereafter be begun in any court of quarter sessions of this Commonwealth for the opening and laying out of any private

road in any township in this Commonwealth, such private road shall be physically opened upon the ground for use by the parties petitioning for the laying out of such road within the period of five years next after the entry of the final decree confirming said road and not thereafter. 1925, May 12, P.L. 586, §1.

§2738. Failure to open; land to revert

In the event that the proceeding for the opening and laying out of a private road referred to in the preceding section[1] shall have been completed, and a final decree confirming said road shall have been made, and such proposed road shall not have been physically opened upon the ground, and shall have remained or shall remain unopened to use for a continuous period of five years next after the entry of the final decree confirming said road, then such proceedings shall be deemed to be void and of no effect, and the land proposed to be taken shall revert to the owners of the land, as in the case of the vacation of a public road, free of any easement or right of the petitioner or petitioners for such road to use the same: Provided, That in all proceedings heretofore had and in which the final decree shall have been made for a period of four years and upwards prior to the passage of this act, then in that case the proceedings shall not be deemed void for a period of one year from the approval hereof. 1925, May 12, P.L. 586, §2. [Footnote omitted.]

§2761. Use by others than petitioners

Whenever any person shall be desirous to make use of a private road laid out on the petition and at the expense of others, such person may apply by petition to the court of quarter sessions of the respective county, to be admitted to participate in the privilege of the said road, and thereupon such court shall have power to determine what sum he shall contribute to the persons at whose expense the said road was

laid out, and also what further sum he shall pay to the owners of the soil over which the said road was made, and upon the payment thereof, such person shall be entitled to equal rights and privileges, and be subject to like duties and liabilities with the original applicants for said road. 1836, June 13, P.L. 551, §17.

§2762. Appeal from assessments

In the several counties of this commonwealth, where by existing laws the duty of laying out public and private roads is imposed upon the supervisors or road commissioners of the respective townships, any person interested, who may feel aggrieved with the assessment of the amount to be paid for the privilege of participating in the use of a private road, either as to the amount to be paid to the owner of the soil, or to the person or persons who have constructed such road, may, at any time within thirty days from the filing of such report, appeal from said assessment, in the same manner as now provided by law for the appealing from the assessment of damages for the laying out and opening of public roads. 1887, May 23, P.L. 180, No. 120, §1.

§2763. Private roads opened under special acts

The seventh, eighth and ninth sections of the act of June 15, 1986, entitled "An act relating to roads, highways, and bridges,"[1] shall be construed to apply to claims for damages, in consequence of injury sustained from the location and opening of a road, under the provisions of any special act of assembly, unless where the same is otherwise provided for by law. 1840, May 29, P.L. 749, §1. [Footnote omitted.]

§2781. Retention of vacated public road as private road

Whenever viewers, appointed by the court of quarter sessions to view and vacate any public road within this Commonwealth, shall find and report that there is no necessity for

such public road, but shall recommend in their report that the route thereof, or of any portion thereof, be and remain a private road, upon the approval of their said report and the confirmation thereof by the court and the vacation of said public road, the court shall have power to enter a decree that the route of such abandoned public road, or any portion thereof, so recommended for a private road, shall be and become a private road, of the width of twenty-five feet, for the use and benefit of the owners of lands through or along which it passes, to be maintained and used as private roads are now maintained and used under existing laws.

EMINENT DOMAIN CODE

§1-101. Short title

This act shall be known and may be cited as the "Eminent Domain Code."

§1-201. Definitions

The following words, when used in this act, unless the context clearly indicates otherwise, shall have the meanings ascribed to them in this section:

(1) **"Condemn"** means to take, injure or destroy private property by authority of law for a public purpose.

(2) **"Condemnee"** means the owner of a property interest taken, injured or destroyed, but does not include a mortgagee, judgment creditor, or other lien holder.

(3) **"Condemnor"** means the acquiring agency, including the Commonwealth of Pennsylvania, taking, injuring or destroying private property under authority of law for a public purpose.

(4) **"Court"** means the court of common pleas.

(5) **"Acquiring agency"** means any entity vested with the power of eminent domain by the laws of the Commonwealth, including the Commonwealth. For purposes of Article VI-A, "acquiring agency" shall also include other agencies or persons which are carrying out a program or project to the extent that they cause a person to become a displaced person.

(6) **"Acquisition cost"** means general damages, or in the event of amicable acquisition, the price paid by the acquiring agency in lieu thereof.

(7) **"Business"** means any lawful activity, excepting a farm operation, conducted primarily:

(i) for the purchase, sale, lease or rental of personal or real property, or for the manufacture, processing, or marketing or products, commodities, or any other personal property;

(ii) for the sale of services to the public;

(iii) by a nonprofit organization; or

(iv) solely for the purpose of qualification for damages under subsections (a) and (b)(1) and (b)(4) of section 601-A,[1] for assisting in the purchase, sale, resale, manufacture, processing, or marketing of products, commodities, personal property, or services by the erection and maintenance of an outdoor advertising display or displays whether or not such displays are located on the premises on which any of the above activities are conducted.

(8) **"Displaced person"**

(i) Means:

(A) Any condemnee or other person who moves from real property or moves his personal property from real property:

(I) as a direct result of a written notice of intent to acquire or the acquisition of such real property, in whole or in part, for a program or project undertaken by an acquiring agency; or

(II) on which such person is a residential tenant or conducts a small business, a farm operation or a business as defined in section 201(7)(iv)[2] as a direct result of rehabilitation, demolition or such other displacing activity under a program or project undertaken by an acquiring agency in any case in which the displacement is permanent.

(B) Solely for the purpose of section 601-A(a)(1) and (2)[3] of this act, any person who moves from real property or moves his personal property:

(I) as a direct result of a written notice of intent to acquire or the acquisition of other real property, in whole or in part, on which such person conducts a business or farm operation, for a program or project undertaken by an acquiring agency; or

(II) as a direct result of rehabilitation, demolition or other displacing activity of other real property on which such person conducts a business or a farm operation, under a program or project undertaken by an acquiring agency where the displacement is permanent.

(C) A person who was in occupancy of the real property on or before the date of acquisition notwithstanding the termination or expiration of a lease entered into before or after the event giving rise to the displacement.

(ii) Does not include:

(A) a person who unlawfully occupies the displacement dwelling or occupied the dwelling for the purpose of obtaining assistance under this act; or

(B) in any case in which the acquiring agency acquires property for a program or project, a person (other than a person who was an occupant of such property at the time it was acquired) who occupies the property on a rental basis for a short term or a period subject to termination when the property is needed for the program or project.

(9) **"Farm Operation"** means any activity conducted solely or primarily for the production of one or more agricultural products or commodities, including timber, for sale or

home use, and customarily producing such products or commodities in sufficient quantity to be capable of contributing materially to the operator's support.

(10) **"Personal property"** means any tangible property not considered to be real property for purposes of general damages under the laws of the Commonwealth.

(11) **"Program or project"** means any program or project undertaken by or for an acquiring agency as to which it has the authority to exercise the power of eminent domain.

(12) **"Natural disaster"** means a natural disaster officially declared as such by the Governor of the Commonwealth of Pennsylvania.

(13) **"Comparable replacement dwelling"** means a dwelling that is:

(i) decent, safe and sanitary;

(ii) adequate in size to accommodate the occupants;

(iii) within the financial means of the displaced person;

(iv) functionally equivalent;

(v) in an area not subject to unreasonable adverse environmental conditions; and

(vi) in a location generally not less desirable than the location of the displaced person's dwelling with respect to public utilities, facilities, services and the displaced person's place of employment.

(14) **"Small business"** means a business having not more than five hundred employees working at the site being acquired or permanently displaced by a program or project. [Footnotes omitted.]

§1-301. Severability

If any provision of this act or the application thereof to any person or circumstances is held invalid, the remainder of

this act, and the application of such provision to other persons or circumstances, shall not be affected thereby and to this end the provisions of this act are declared to be severable.

§1-302. Effective date

This act shall take effect immediately upon approval, and shall apply to all condemnations effected thereafter, except the provisions of Article IV,[1] which shall not take effect until September 1, 1964 and shall apply to all condemnations effected thereafter. The provisions of Articles V[2] and VII[3] shall also apply to all steps taken subsequent to the effective date of this act in all condemnation proceedings in which the condemnation was effected prior to the effective date of this act. [Footnotes omitted.]

§1-303. Intent of act; exclusions

It is intended by this act to provide a complete and exclusive procedure and law to govern all condemnations of property for public purposes and the assessment of damages therefor, except as provided in section 901:[1] Provided, however, That nothing in this act shall be deemed to affect, vary, alter or modify the jurisdiction or power of the Public Utility Commission of the Commonwealth of Pennsylvania, the State Mining Commission created under the act of June 1, 1933 (P.L. 1409), as reenacted and amended,[2] or any act providing for the assessment of benefits for public improvements on the properties benefited. This act is not intended to enlarge or diminish the powers of condemnation given by law to any condemnor. [Footnotes omitted.]

§1-401. Jurisdiction and venue

All condemnation proceedings shall be brought in the court of common pleas of the county in which the property is located, or, if the property is located in two or more counties, then in the court of common pleas of any one of the counties.

Where the property is located in two or more counties, and a proceeding is commenced in the court of one of the counties all subsequent proceedings regarding the same property shall be brought in the same county.

§1-402. Condemnation; passage of title; declaration of taking

(a) Condemnation, under the power of condemnation given by law to a condemnor, which shall not be enlarged or diminished hereby, shall be effected only by the filing in court of a declaration of taking, with such security as may be required under section 403(a),[1] and thereupon the title which the condemnor acquires in the property condemned shall pass to the condemnor on the date of such filing, and the condemnor shall be entitled to possession as provided in section 407.[2]

(b) The declaration of taking shall be in writing and executed by the condemnor, shall be captioned as a proceeding in rem, and shall contain the following:

(1) The name and address of the condemnor.

(2) A specific reference to the statute, article and section thereof under which the condemnation is authorized.

(3) A specific reference to the action, whether by ordinance, resolution or otherwise, by which the declaration of taking was authorized, including the date when such action was taken, and the place where the record thereof may be examined.

(4) A brief description of the purpose of the condemnation.

(5) A description of the property condemned sufficient for the identification thereof, specifying the city, borough, township or town and the county or counties wherein the property taken is located, a reference to the

place of recording in the office of the recorder of deeds of plans showing the property condemned or a statement that plans showing the property condemned are on the same day being lodged for record or filed in the office of the recorder of deeds in such county in accordance with section 404 of this act.

(6) A statement of the nature of the title acquired, if any.

(7) A statement specifying where a plan showing the condemned property may be inspected in the county in which the property taken is located.

(8) A statement of how just compensation has been made or secured.

(c) The condemnor may include in one declaration of taking any or all of the properties specified in the action by which the declaration of taking was authorized. The prothonotary shall charge one fee for filing each declaration of taking, which shall be the same regardless of the number of properties or condemnees included therein.

(d) The condemnor shall file within one year of the action authorizing the declaration of taking, a declaration or declarations of taking covering all properties included in such authorization not otherwise acquired by the condemnor within such time. [Footnotes omitted.]

§1-403. Security required

(a) Bond. Except as hereinafter provided, every condemnor shall give security to effect the condemnation by filing with the declaration of taking its bond, without surety, to the Commonwealth of Pennsylvania for the use of the owner or owners of the property interests condemned, the condition of which shall be that the condemnor shall pay such damages as shall be determined by law.

(b) Power of Taxation. Where a condemnor has the power of taxation, it shall not be required to file a bond with the declaration of taking. The funds raised, or lawful to be raised, by the power of taxation of the condemnor shall be deemed pledged and are hereby made security for the payment of the damages as shall be determined by law.

(c) Insufficient Security. The court, upon preliminary objections to the condemnee under and within the time set forth in section 406(a),[1] may require the condemnor to give such bond and security as the court deems proper, if it shall appear to the court that the bond or power of taxation of the condemnor is not sufficient security. [Footnote omitted.]

§1-404. Recording notice of condemnation

The condemnor, upon filing its declaration of taking, shall on the same day lodge for record a notice thereof in the office of the recorder of deeds of the county in which the property is located. If the property is located in two or more counties, the notice shall be recorded in all such counties. The notice shall specify the court term and number of the declaration of taking and the date it was filed, and shall contain a description or plan of the property condemned sufficient for the identification thereof and the names of the owners of the property interests condemned, as reasonably known to the condemnor, and shall be indexed in the deed indices showing the condemnee set forth in the notice as grantor and the condemnor as grantee. If plans are to be recorded as part of the notice they shall be submitted on standard legal size paper. If plans are to be filed as part of the notice they shall be in legible scale and filed in a condemnation book or file or microfilmed, with a notation as to the condemnation book and page number, file number or microfilm number to be made by the recorder on the margin of the notice. The recorder shall receive as a fee for recording each notice the sum of five dollars ($5) plus one

dollar ($1) for each page recorded after the first, and for filing plans two dollars and fifty cents ($2.50) for each page or sheet of plan filed and twenty-five cents (25¢) for each name indexed. Upon the notice being assigned a book and page number by the recorder of deeds the condemnor shall file with the prothonotary under the caption of the declaration of taking a memorandum of the book and page number in which the notice is recorded.

§1-405. Notice to condemnee

Within thirty days after the filing of the declaration of taking, the condemnor shall give written notice of the filing to the condemnee.

The notice shall be served within or without the Commonwealth, by any competent adult in the same manner as a complaint or writ of summons in assumpsit, or by certified or registered mail, to the last known address of the condemnee. If service cannot be made in the manner as provided, then service shall be made by posting a copy of the notice upon the most public part of the property and by publication of a copy of the notice omitting the plot plan required by subsection (c)(8), one time each in one newspaper of general circulation and the legal journal, if any, published in the county.

The notice to be given the condemnee shall state:

(1) The caption of the case.

(2) The date of filing of the declaration of taking and the court term and number thereof.

(3) The name of the condemnee or condemnees to whom it is directed.

(4) The name and address of the condemnor.

(5) A specific reference to the statute, article and section thereof under which the condemnation action is authorized.

(6) A specific reference to the action, whether by ordinance, resolution or otherwise, by which the declaration of taking was authorized, including the date when such action was taken, and the place where the record thereof may be examined.

(7) A brief description of the purpose of the condemnation.

(8) A statement that the condemnee's property has been condemned and a reasonable identification thereof in the case of a total taking and, in the case of a partial taking, a plot plan showing the condemnee's entire property and the area taken.

(9) A statement of the nature of the title acquired.

§1-406. Preliminary objections

(a) Within thirty days after being served with notice of condemnation, the condemnee may file preliminary objections to the declaration of taking. The court upon cause shown may extend the time for filing preliminary objections. Preliminary objections shall be limited to and shall be the exclusive method of challenging (1) the power or right of the condemnor to appropriate the condemned property unless the same has been previously adjudicated; (2) the sufficiency of the security; (3) any other procedure followed by the condemnor; or (4) the declaration of taking. Failure to raise these matters by preliminary objections shall constitute a waiver thereof.

(b) Preliminary objections shall state specifically the grounds relied upon.

(c) All preliminary objections shall be raised at one time and in one pleading. They may be inconsistent.

(d) The condemnee shall serve a copy of the preliminary objections on the condemnor within seventy-two hours after filing the same.

(e) The court shall determine promptly all preliminary objections and make such preliminary and final orders and decrees as justice shall require, including the revesting of title. If preliminary objections are finally sustained, which have the effect of finally terminating the condemnation, the condemnee shall be entitled to damages as if the condemnation had been revoked under section 408,[1] to be assessed as therein provided. If an issue of fact is raised, the court shall take evidence by depositions or otherwise. The court may allow amendment or direct the filing of a more specific declaration of taking. [Footnote omitted.]

§1-407. Possession; entry; payment of compensation

(a) The condemnor, after the expiration of the time for filing preliminary objections by the condemnee to the declaration of taking, shall be entitled to possession or right of entry upon payment of, or a written offer to pay to the condemnee, the amount of just compensation as estimated by the condemnor. If a condemnee thereafter refuses to deliver possession or permit right of entry, the prothonotary upon praecipe of the condemnor shall issue a rule, returnable in five days after service upon the condemnee, to show cause why a writ of possession should not issue, upon which the court, unless preliminary objections warranting delay are pending, may issue a writ of possession conditioned upon payment to the condemnee or into court of such estimated just compensation and on such other terms as the court may direct.

(b) If within sixty days from the filing of the declaration of taking, the condemnor has not paid just compensation as provided in subsection (a) of this section, the condemnee may tender possession or right of entry in writing and the condemnor shall thereupon make payment of the just compensation due such condemnee as estimated by the condemnor. If the condemnor fails to make such payment the court, upon peti-

tion of the condemnee, may compel the condemnor to file a declaration of estimated just compensation or, if the condemnor fails or refuses to file such declaration, may at the cost of the condemnor appoint an impartial expert appraiser to estimate such just compensation. The court may, after hearing, enter judgment for the amount of the estimated just compensation.

(c) The compensation paid under subsections (a) and (b) of this section shall be without prejudice to the rights of either the condemnor or the condemnee to proceed to a final determination of the just compensation and the payments heretofore made shall be considered only as payments pro tanto of the just compensation as finally determined. However, in no event shall the condemnee be compelled to pay back to the condemnor the compensation paid under subsections (a) and/or (b), even if the amount of just compensation as finally determined shall be less than the compensation so paid.

§1-408. Revocation of condemnation proceedings

The condemnor, by filing a declaration of relinquishment in court within one year from the filing of the declaration of taking, and before having made the payment provided for in section 407(a) or (b),[1] or as to which the condemnee has not tendered possession of the condemned property as provided in section 407, may relinquish all or any part of the property condemned that it has not taken actual possession of for use in the improvement, whereupon title shall revest in the condemnee as of the date of the filing of the declaration of taking, and all mortgages and other liens existing as of such date shall be reinstated. Notice of said relinquishment shall be recorded in the office of the recorder of deeds of the county in which the property taken is located, with the condemnor as the grantor and the condemnee as the grantee, and the notice of said relinquishment shall be served on the condemnee in the

same manner as provided for service of the declaration of taking. The fees payable to the recorder for recording the notice of relinquishment shall be in the same amounts as provided in section 404[2] for the recording of notices of condemnation. Where condemned property is relinquished, the condemnee shall be reimbursed by the condemnor for reasonable appraisal, attorney and engineering fees and other costs and expenses actually incurred because of the condemnation proceedings. Such damages shall be assessed by the court, or the court may refer the matter to viewers to ascertain and assess the damages sustained by the condemnee, whose award shall by [sic] subject to appeal as provided in this act. The condemnor and the condemnee, without the filing of a declaration of relinquishment, as provided herein, may be [sic] agreement effect a revesting of title in the condemnee, which agreement shall be properly recorded. [Footnotes omitted.]

§1-409. Right to enter property prior to condemnation

Prior to the filing of the declaration of taking, the condemnor or its employes or agents, shall have the right to enter upon any land or improvement which it has the power to condemn, in order to make studies, surveys, tests, soundings and appraisals, provided that the owner of the land or the party in whose name the property is assessed has been notified ten days prior to entry on the property. Any actual damages sustained by the owner of a property interest in the property entered upon by the condemnor shall be paid by the condemnor and shall be assessed by the court or viewers in the same manner as provided in section 408.[1] [Footnote omitted.]

§1-410. Abandonment of project

(a) If a condemnor has condemned a fee and thereafter abandons the purpose for which the property has been condemned, the condemnor may dispose of it by sale or otherwise: Provided, however, That if the property has not been substan-

tially improved, it may not be disposed of within three years after condemnation without first being offered to the condemnee at the same price paid to the condemnee by the condemnor; And provided further, That if the property is not located within the corporate boundaries of a county of the first or second class and has not been substantially improved and was devoted to agricultural use at the time of the condemnation, it may not be disposed of within twelve years after condemnation without first being offered to the condemnee at the same price paid to the condemnee by the condemnor. The condemnee shall be served with notice of the offer in the same manner as prescribed for the service of notices in subsection (b) of section 405 of this act,[1] and shall have ninety days after receipt of such notice to make written acceptance thereof.

(b) The condemnor may not condition any offer required to be made to a condemnee under subsection (a), on the payment by the condemnee of additional fees, real estate taxes or payments in lieu of taxes or other costs.

(c) As used in this section:

"Agricultural commodity" means any and all plant and animal products including Christmas trees produced in this State for commercial purposes.

"Agricultural use" means use of the land for the purpose of producing an agricultural commodity or when devoted to and meeting the requirements and qualifications for payments or other compensation pursuant to a soil conservation program under an agreement with an agency of the Federal Government. Land containing a farmhouse or other buildings related to farming shall be deemed to be in agricultural use. [Footnote omitted.]

§1-501. Agreement as to damages

At any stage of the proceedings, the condemnor and the condemnee may agree upon all or any part or item of the

damages, and proceed to have those parts or items thereof not agreed upon assessed as herein provided. The condemnor may make payment of any part or item thereof so agreed upon.

§1-502. Petition for the appointment of viewers

(a) The condemnee may file a petition requesting the appointment of viewers, setting forth:

(1) A caption which shall be the caption of the proceeding substantially as set forth in the declaration of taking, with an identification of the petitioner and his property. The petitioner shall be designated as the plaintiff. Except as otherwise ordered by the court, the viewers' proceedings shall be at the same court term and number as the declaration of taking.

(2) The date of the filing of the declaration of taking and whether any preliminary objections thereto have been filed and remain undisposed of.

(3) The name of the condemnor.

(4) The names and addresses of all condemnees and mortgagees known to the petitioner to have an interest in his property and the nature of their interests.

(5) A brief description of his property which may include any or all of his properties in the same county taken, injured or destroyed for the same purpose by the condemnor, whether by the same or separate declarations or without a declaration of taking.

(6) A request for the appointment of viewers to ascertain just compensation.

(b) The condemnor may file a petition requesting the appointment of viewers, setting forth:

(1) A caption which shall be the caption of the proceeding substantially as set forth in the declaration of

taking, to which shall be added the name of the condemnee as plaintiff as to whose property the petition is filed and name of the condemnor as defendant. If there is more than one condemnee it shall be sufficient to designate the name of the first condemnee as the plaintiff with appropriate indication of other condemnees. Except as otherwise ordered by the court, the viewers' proceedings shall be at the same term and number as the declaration of taking.

(2) The date of the filing of the declaration of taking and whether any preliminary objections thereto have been filed and remain undisposed of.

(3) The names and addresses of all condemnees known to the petitioner to have an interest in the property which is the subject of the petition and the nature of their interests.

(4) A brief description of the property which is the subject of the petition and the interest condemned.

(5) A request for the appointment of viewers to ascertain just compensation.

(c) The condemnor may include in its petition any or all of the property included in the declaration of taking.

(d) The court appointing the viewers may, on its own motion or at the request of a party, direct them to determine the damages for any or all of the properties included in the declaration of taking or any or all properties taken, injured or destroyed for the same purpose by a condemnor without a declaration of taking.

(e) If there has been a compensable injury suffered and no declaration of taking therefor has been filed, a condemnee may file a petition for the appointment of viewers substantially

in the form provided for in subsection (a) of this section, setting forth such injury.

(f) A copy of any petition for the appointment of viewers filed by a condemnee shall be sent promptly by registered or certified mail, return receipt requested, to the adverse party.

(g) The court, in furtherance of convenience or to avoid prejudice, may on its own motion or on motion of any party, order separate viewers' proceedings or trial when more than one property has been included in the petition.

§1-503. View

In every proceeding at least one of the viewers appointed shall be an attorney at law who shall be chairman of the board, who shall attend the view, and at least two of the three viewers appointed shall view the property in question.

§1-504. Appointment of viewers; notice; objections

Upon the filing of a petition for the appointment of viewers, the court, unless preliminary objections to the validity of the condemnation or jurisdiction, warranting delay, are pending, shall promptly appoint three viewers, who shall view the premises, hold hearings, and file a report. In counties of the first class, the court may appoint an alternate viewer in addition to the three viewers specifically appointed, The prothonotary shall promptly notify the viewers of their appointment unless a local rule provides another method of notification.

The viewers shall promptly give written notice by registered or certified mail, return receipt requested, of their appointment to all persons named as condemnors or condemnees in the petition for the appointment of viewers and of the place and time of the view, which shall not be less than twenty days from the date of said notice.

If notice of the view does not include notice of a time and place of subsequent hearings and time and place is not agreed upon by the parties at the view, notice of the hearing shall be given by not less than ten days' written notice by registered or certified mail, return receipt requested.

Any objections to the appointment of viewers not theretofore waived may be raised by preliminary objections filed within twenty days after receipt of notice of the appointment of viewers. Objections to the form of the petition or the appointment or the qualification of the viewers are waived unless included in preliminary objections. The court shall determine promptly all preliminary objections and make such orders and decrees as justice shall require. If an issue of fact is raised, evidence may be taken by deposition or otherwise as the court shall direct.

§1-505. Service of notice of view and hearing

Notice of the view and hearing shall be served, within or without the Commonwealth by any competent adult in the same manner as a writ of summons in assumpsit, or by certified or registered mail, return receipt requested, the last known address of the condemnee and condemnor. If service cannot be made in the manner so provided, then service shall be made by posting a copy of the notice upon a public part of the property and by publication, at the cost of the condemnor, once in a newspaper of general circulation and once in the legal publication, if any, designated by rule or order of court for publication of legal notices, published in the county. Proof of service and the manner of same shall be attached to the viewers' report.

§1-506. Additional condemnees; mortgagees

(a) The condemnee, at or before the hearing at which his claim is presented, shall furnish the viewers and the condemnor the names and addresses of all other condemnees known

to him to have an interest in his property and the nature of such interests and the names and addresses of all mortgagees known to the condemnee. The viewers shall thereupon notify by written notice all persons who are so disclosed as having an interest in the property and mortgagees, of the pendency of the proceedings and of subsequent hearings. If the additional condemnees and mortgagees have not received twenty days' notice of the hearing, the viewers shall, upon request, adjourn the hearing to allow such notice.

(b) The court may permit a mortgagee, judgment creditor or other lien holder to intervene in the proceedings where his interest is not adequately protected, but he shall not be a party to the proceedings unless he has intervened.

§1-507. Joint claims required; apportionment of damages; separate hearings allowed

(a) The claims of all the owners of the condemned property, including joint tenants, tenants in common, life tenants, remaindermen, owners of easements, or ground rents, and all others having an interest in the property, and the claims of all tenants, if any, of the property, shall be heard or tried together and the award of the viewers or the verdict on appeal from the viewers shall first fix the total amount of damages for the property; and second, apportion the total amount of damages between or among the several claimants entitled thereto.

(b) Claims for removal expenses, business dislocation damages and moving expenses may be heard or tried separately.

§1-508. Appointment of trustees or guardian ad litem

The court, on its own motion may, or on petition of any party in interest shall, appoint a trustee ad litem or guardian ad litem, as may be appropriate, in accordance with the Rules of Civil Procedure.

§1-509. Furnishing of plans to viewers

The condemnor shall furnish the viewers at or before the view with a plan showing the entire property involved, the improvements thereon, the extent and nature of the condemnation and such other physical data, including grades, as may be necessary for the proper determination of just compensation. If, in the opinion of the viewers, the plans are insufficient, they may require the submission of supplemental plans. Copies of the plan shall be furnished at the same time, without cost, to the condemnee upon written request therefor. If the condemnor does not furnish a plan or the condemnor's plans are insufficient, the court, on application of the condemnee, may tax to the condemnor as costs reasonable expenses for plans furnished by the condemnee.

§1-510. Powers of viewers

The viewers shall have power to adjourn the proceedings from time to time. Upon request of the viewers or a party, the court which appointed the viewers shall issue a subpoena to testify or to produce books and documents. All the viewers shall act, unless prevented by sickness or other unavoidable cause; but a majority of the viewers may hear, determine, act upon and report all matters relating to the view for which they were appointed. The provisions of this section shall not be affected by the appointment of an alternate viewer as provided for in section 504.[1] [Footnote omitted.]

§1-511. Report of viewers

The viewers shall file a report which shall include in brief and concise paragraph form:

(1) The date of their appointment as viewers.

(2) A reference to the notices of the time and place of view and hearing with proof of service of notices, which shall be attached to the report.

(3) A copy of the plan showing the extent of the taking or injury upon which the viewers' award is predicated and a statement of the nature of the interest condemned.

(4) The date of the filing of the declaration of taking or of the injury where no declaration of taking has been filed.

(5) A schedule of damages awarded and benefits assessed, to and by whom payable, and for which property, separately stated as follows: general damages, moving and removal expenses, business dislocation damages and other items of special damages authorized by this act, and the date from which damages for delay shall be calculated.

(6) In case of partial taking, a statement as to the amount of the general damages attributable as severance damages to the part of the property not taken, if such apportionment has been requested in writing by the condemnee.

(7) Where there are several interests in the condemned property, a statement of the total amount of damages and the distribution thereof between or among the several claimants therefor.

(8) If there are other claimants to any interest or estate in the property condemned, and the viewers' determination of the extent if any of each interest in the property and in the award.

(9) Their rulings on any written requests for findings of fact and conclusions of law submitted to them.

(10) Such other matters as they may deem relevant.

§1-512. Disagreement

If a majority of the viewers do not agree on a decision, three new viewers shall be appointed by the court upon application of any interested party.

§1-513. Filing of report of viewers

The viewers shall file their report within thirty days of their final hearing or within thirty days from the filing of the transcription of the stenographic notes of testimony, which transcription shall be filed within thirty days of the final hearing. Ten days before the filing of their report, the viewers shall mail a copy thereof to all parties or their attorneys of record, with notice of the date of the intended filing and that the report shall become final unless an appeal therefrom is filed within thirty days from the date the report is filed. Prior to the filing of their report they may correct any errors therein and give notice thereof to the persons affected.

§1-514. Reports

The viewers may include in one report one or more properties or claims under sections 608, 609 and 610[1] referred to them under the same or separate petitions provided such properties are included in the same declaration of taking. The viewers may file a separate report for removal expenses, business dislocation damages and moving expenses. Each such report shall be final as to the property or properties included therein and subject to separate appeal. [Footnote omitted.]

§1-515. Appeals; time of taking; consolidation

Any party aggrieved by the decision of the viewers may appeal to the court of common pleas. The appeal shall raise all objections of law or fact to the viewers' report. The appeal shall be signed by the appellant or his attorney or his agent and no verification shall be required. Any award of damages or assessment of benefits, as the case may be, as to which no appeal is taken, shall become final as of course and shall constitute a final judgment.

The court, on its own motion, or on application of any party in interest, may consolidate separate appeals involving only common questions of law as one proceeding.

If a condemnee having less than the entire interest in the condemned property appeals the award to him, the condemnor shall have an additional fifteen days to appeal the entire award.

§1-516. Appeals

(a) The appeal shall set forth:

(1) The name of appellant and appellee.

(2) A brief description or identification of the property involved and the condemnee's interest therein.

(3) A reference to the proceedings appealed from and the date of the filing of the viewers' report.

(4) Objections, if any, to the viewers' report, other than to the amount of the award.

(5) A demand for jury trial, if desired. If the appellant desires a jury trial, he shall at the time of filing the appeal, endorse thereon, or file separately, a written demand for jury trial, signed by him or counsel. If no demand for jury trial is made by the appellant, any other party may file a written demand for jury trial within fifteen days after being served with a copy of the appeal. If no party makes a demand for a jury trial as set forth herein, the right to jury trial shall be deemed to have been waived and the court shall try the case without a jury.

(b) The appellant shall serve a copy of the appeal on all other parties within five days after filing the same. Proof of service of a copy of the appeal shall be filed by the appellant.

(c) No other pleadings shall be required and the cause shall be deemed at issue.

§1-517. Disposition of appeal

All objections, other than to the amount of the award, raised by the appeal shall be determined by the court preliminarily. The court may confirm, modify, change the report or refer it back to the same or other viewers. A decree confirming, modifying or changing the report shall constitute a final order.

The amount of damages shall be determined by the court unless a jury trial has been demanded.

At the trial of the case, the condemnee shall be the plaintiff and the condemnor shall be the defendant.

§1-518. Severance and special damages; allocation

(a) Upon appeal from an award of viewers, the court, upon the request of the plaintiff, shall, after the jury or the court, if the trial is without jury, has returned its general verdict, make a specific finding and allocation of the amount of the general verdict attributable to severance damages to the part of the property not taken.

(b) The jury, or the court, in a trial without a jury, shall make specific findings as to the portion of the verdict allocated to general damages, moving and removal expenses, business dislocation damages and other items of special damages authorized by this act, except reasonable appraisal, attorney and engineering fees recoverable under sections 406(e), 408, 609 and 610,[1] which shall be determined by the court in an appropriate case. [Footnote omitted.]

§1-519. Repealed, 1978, April 28, P.L. 202, No. 53, §2(a)[1376], effective June 27, 1979

§1-520. Waiver of viewers' proceedings; termination by stipulation

(a) The condemnor and condemnee may, by written agreement filed with and approved by the court, waive proceedings before viewers and proceed directly, to the said court,

on agreed issues of law or fact. The proceedings thereafter shall be the same as on appeal from a report of viewers.

(b) At any time after the filing of a petition for the appointment of viewers, the parties may by stipulation filed with the prothonotary terminate the viewers' proceedings as to all or part of the properties involved and stipulate that judgment may be entered for the amount of damages agreed on for each property interest covered by the stipulation. A copy of the stipulation shall be filed with the viewers.

§1-521. Distribution of damages; liens

Damages payable to a condemnee under sections 601 through 607, 611, 612 and 613, inclusive, and clauses (1) and (2) of subsection (b) of section 601-A of this act[1] shall be subject to a lien for all taxes and municipal claims assessed against and all mortgages, judgments and other liens of record against the property for which the particular damages are payable, existing at the date of the filing of the declaration of taking, and said liens shall be paid out of the damages in order of priority before any payment thereof to the condemnee, unless released.

In the case of a partial taking, or of damages under sections 612 and 613, the lienholder shall be entitled only to an equitable pro rata share of the damages lienable under this section.

It shall be the obligation of the condemnor to properly distribute the damages. It [sic] the condemnor is unable to determine proper distribution of the damages, it may, without payment into court, petition the court to distribute the damages and shall furnish the court with a schedule of proposed distribution.

Notice of the filing of the petition and schedule of proposed distribution shall be given to all condemnees, mortgagees, judgment creditors and other lienholders, as shown in

the proposed schedule, in such manner as the court may by general rule or special order direct. The court may hear the matter or may appoint a master to hear and report or may order any issue tried by the court and jury as may appear proper under all the circumstances. The court shall thereafter enter an order of distribution of the fund. [Footnote omitted.]

§1-522. Payment into court; distribution

Upon refusal to accept payment of the damages, or of the estimated just compensation under section 407,[1] or if the party entitled thereto cannot be found, or if for any other reason the same cannot be paid to the party entitled thereto, the court upon petition of the condemnor which shall include a schedule of proposed distribution, may direct payment thereof and costs into court or as the court may direct in full satisfaction thereof.

The condemnor shall give twenty days notice of the presentation of such petition, including a copy of the schedule of the proposed distribution, to all parties in interest known to condemnor, in such manner as the court may by general rule or special order direct. If the court shall be satisfied in a particular case that condemnor failed to use reasonable diligence in giving notice, the court may upon petition of any party in interest adversely affected by the failure to give notice order that compensation for delay in payment be awarded to such party for the period after deposit in court by the condemnor under this section until such time as such party in interest shall have received a distribution of funds under this section.

The court thereafter upon petition of any party in interest shall distribute such funds or any funds deposited in court under section 407 to the persons entitled thereto in accordance with the procedure in section 521,[2] but if no petition is presented within a period of five years of the date of payment into court, the court shall order the fund or any balance remaining to be paid to the Commonwealth without escheat.

No fee shall be charged against these funds. [Footnotes omitted.]

§1-601. Just compensation

The condemnee shall be entitled to just compensation for the taking, injury or destruction of his property, determined as set forth in this article.

§1-602. Measure of damages

(a) Just compensation shall consist of the difference between the fair market value of the condemnee's entire property interest immediately before the condemnation and as unaffected thereby and the fair market value of his property interest remaining immediately after such condemnation and as affected thereby, and such other damages as are provided in this code.

(b) In case of the condemnation of property in connection with any urban development or development project, which property is damaged by subsidence due to failure of surface support resulting from the existence of mine tunnels or passageways under the said property, or by reason of fires occurring in said mine tunnels or passageways or of burning coal refuse banks, the damage resulting from such subsidence or underground fires or burning coal refuse banks shall be excluded in determining the fair market value of the condemnee's entire property interest therein immediately before the condemnation.

(c) In case of the condemnation of property in connection with any program or project which property is damaged by any natural disaster, the damage resulting therefrom shall be excluded in determining fair market value of the condemnee's entire property interest therein immediately before the condemnation.

(d) In the case of property which was damaged by any natural disaster, an acquiring agency may acquire the entire property interest of a condemnee, except any improvements made since the date of such natural disaster, and reconvey to the condemnee a portion of the property interest taken; in which case the damage shall be the difference between the value of the property interest acquired, excluding damage resulting from such natural disaster, and the value of the property interest reconveyed. For the purposes of this act, all mobile homes which are in use as dwellings and were destroyed, demolished or damaged beyond reasonable repair by any natural disaster shall be considered to be real property.

(e) Subsections (c) and (d) are applicable only where the damage resulting from such natural disaster has occurred within three years prior to the initiation of negotiations for or notice of intent to acquire or order to vacate the property and during the ownership of the property by the condemnee. The damage to be excluded shall include only actual physical damage to the property for which the condemnee has not received any compensation or reimbursement.

§1-603. Fair market value

Fair market value shall be the price which would be agreed to by a willing and informed seller and buyer, taking into consideration, but not limited to, the following factors:

(1) The present use of the property and its value for such use.

(2) The highest and best reasonably available use of the property and its value for such use.

(3) The machinery, equipment and fixtures forming part of the real estate taken.

(4) Other factors as to which evidence may be offered as provided by Article VII.[1] [Footnote omitted.]

§1-604. Effect of imminence of condemnation

Any change in the fair market value prior to the date of condemnation which the condemnor or condemnee establishes was substantially due to the general knowledge of the imminence of condemnation, other than that due to physical deterioration of the property within the reasonable control of the condemnee, shall be disregarded in determining fair market value.

§1-605. Contiguous tracts; unity of use.

Where all or part of several contiguous tracts owned by one owner is condemned or a part of several non-contiguous tracts owned by one owner which are used together for a unified purpose is condemned, damages shall be assessed as if such tracts were one parcel.

§1-606. Effect of condemnation use on after value

In determining the fair market value of the remaining property after a partial taking, consideration shall be given to the use to which the property condemned is to be put and the damages or benefits specially affecting the remaining property due to its proximity to the improvement for which the property was taken. Future damages and general benefits which will affect the entire community beyond the properties directly abutting the property taken shall not be considered in arriving at the after value. Special benefits to the remaining property shall in no event exceed the total damages except in such cases where the condemnor is authorized under existing law, to make special assessments for benefits.

§1-607. Removal of machinery, equipment or fixtures

In the event the condemnor does not require for its use machinery, equipment or fixtures forming part of the real estate, it shall so notify the condemnee. The condemnee may within thirty days of such notice elect to remove said machin-

ery, equipment or fixtures, unless the time be extended by the condemnor. If the condemnee so elects, the damages shall be reduced by the fair market value thereof severed from the real estate.

§1-608. Expenses incidental to transfer of title

Any acquiring agency shall, on the date of payment of the purchase price of amicably acquired real property or of payment or tender of estimated just compensation in a condemnation proceeding to acquire real property, whichever is the earlier, or as soon thereafter as is practicable, reimburse the owner for expenses he necessarily incurred for:

(1) Recording fees, transfer taxes and similar expenses incidental to conveying such real property to the acquiring agency;

(2) Penalty costs for prepayment for any preexisting recorded mortgage entered into in good faith encumbering such real property.

(3) The pro rata portion of real property taxes paid which are allocable to a period subsequent to the date of vesting title in the acquiring agency, or the effective date of possession of such real property by the acquiring agency, whichever is the earlier; and

(4) The pro rata portion of water and sewer charges paid to a taxing entity or a municipal authority allocable to a period subsequent to the effective date of possession of such real property by the acquiring agency.

§1-609. Condemnee's costs where no declaration of taking filed

Where proceedings are instituted by a condemnee under section 502(e),[1] a judgment awarding compensation to the condemnee for the taking of property shall include reimbursement of reasonable appraisal, attorney and engineering fees

and other costs and expenses actually incurred. [Footnote omitted.]

§1-610. Limited reimbursement of appraisal, attorney and engineering fees

The owner of any right, title, or interest in real property acquired or injured by an acquiring agency, who is not eligible for reimbursement of such fees under sections 406(e), 408 or 609 of this act,[1] shall be reimbursed in an amount not to exceed five hundred dollars ($500) as a payment toward reasonable expenses actually incurred for appraisal, attorney and engineering fees. [Footnote omitted.]

§1-610.1. Payment on account of increased mortgage costs

Whenever the acquisition of property by an acquiring agency results in the termination of an installment purchase contract, mortgage or other evidence of debt on the acquired property, thereby requiring the legal or equitable owner to enter into another installment purchase contract, mortgage or other evidence of debt on the property purchased for the same use as the acquired property, a legal or equitable owner who does not qualify for a payment under section 602-A(a)(2)[1] shall be compensated for any increased interest and other debt service costs, which he is required to pay for financing the acquisition of the replacement property. Such amount shall be equal to the excess in the aggregate interest and other debt service costs of that amount on the principal of the installment purchase contract, mortgage or other evidence of debt on the replacement property which is equal to the unpaid balance of the installment purchase contract, mortgage or other evidence of debt on the acquired property over the remaining term of the installment purchase contract, mortgage or other evidence of debt on the acquired property reduced to discounted present value. The discount rate shall be the prevailing interest rate

paid on savings deposits by commercial banks in the general area in which the replacement property is located. Such amount shall be paid only if the acquired property was subject to an installment purchase contract or encumbered by a bona fide mortgage or other evidence of debt secured by the property which was a valid lien in such property for not less than one hundred eighty days prior to the initiation of negotiations for the acquisition of such property. [Footnote omitted.]

§1-611. Delay compensation

The condemnee shall not be entitled to compensation for delay in payment during the period he remains in possession after the condemnation, nor during such period shall a condemnor be entitled to rent or other charges for use and occupancy of the condemned property by the condemnee. Compensation for delay in payment shall, however, be paid at the rate of six per cent per annum from the date of relinquishment of possession of the condemned property by the condemnee, or if the condemnation is such that possession is not required to effectuate it, then delay compensation shall be paid from the date of condemnation: Provided, however, That no compensation for delay shall be payable with respect to funds paid on account or by deposit in court, after the date of such payment or deposit. Compensation for delay shall not be included by the viewers or the court or jury on appeal as part of the award or verdict, but shall at the time of payment of the award or judgment be calculated as above and added thereto. There shall be no further or additional payment of interest on the award or verdict.

§1-612. Consequential damages

All condemnors, including the Commonwealth of Pennsylvania, shall be liable for damages to property abutting the area of an improvement resulting from change of grade of a road or highway, permanent interference with access thereto,

or injury to surface support, whether or not any property is taken.

§1-613. Damages for vacation of roads

Whenever a public road, street, or highway is vacated, the affected owners may recover damages for any injuries sustained thereby, even though no land is actually taken.

Supreme Court, U.S.
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No. 94-1209

In The
Supreme Court of the United States
October Term 1994

DANIEL KAMIN, ROBERT KAMIN, HERMAN KAMIN AND DAVID SILVERBLATT,

Petitioners

vs.

T.L.C. SERVICES, INC.,

Respondent

On Petition For A Writ Of Certiorari To The Superior Court Of Pennsylvania

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

A) Are the Commonwealth of Pennsylvania's "Private Road Act" and "Eminent Domain Code" purposes indistinguishable?

B) Is the "Private Road Act" without procedure due process?

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STATEMENT OF THE CASE

On February 21, 1989 the Respondent filed a petition pursuant to 36 P.S. 2731 et seq, Private Road Act, requesting that a Board of View be appointed. The Court of Common Pleas appointed a Board consisting of three (3): an attorney, surveyor and real estate appraiser. In accordance with the "Private Road Act" the Board convened to decide two issues. First whether the Respondent's need for an easement for a road right of way are "necessary." Secondly, out of the initial hearing and view the Board decided the approximate course of the right of way.

In the matter at Bar, the Board of View did conclude the "necessity" of the

Respondent-Condemnor's right to an easement for a vehicle right of way. Exceptions were filed to the Board's decision but dismissed by the Court of Common Pleas.

The next stage of these bifracted procedures involved preparation of a survey along the course laid out by the Board of View with a proposed width incorporated in the survey. After notice to the Respondent and hearing before the lower Court, the lower Court established the width and exact direction of the right of way-easement. Objections were made and dismissed. An appeal was made to the Pennsylvania Commonwealth Court, and after reviewing the issues now before this Court, the

Commonwealth Court found in favor of the Respondent. The Petitioner filed a Petition For Certiorari to the Pennsylvania Supreme Court which was denied. The matter is now before this Court.

Once the appeals at this stage are decided, the next and final stage of the proceeding is to establish damages. Once damages are established and paid for by the Respondent the road right of way can be open. 36 P.S. 2736

SUMMARY OF ARGUMENT

The Petitioner's argument purports the unequal treatment of individuals when a private individual condemns a right of way versus when a public entity condemned a right of way. It is the Respondent's argument that the "Private Road Act" has a much more limited use yet provides for procedural due process and full compensation to the condemnee. The "Private Road Act" condemnation power is very limited in relation to the State's power under the Eminent Domain Code. Appellants argue that they are similar in purpose and effect but because these statutes are procedurally

different equal protection is denied. This argument is specious. Not only are the procedures different but so are their purposes; therefore, it is error for the Petitioner to argue equal laws are applied unequally to different classes of litigants.

ARGUMENT

The condemnor's powers under the "Private Road Act" is very limited. The right to condemn is limited to a road easement and then only if the condemnor had no viable highway access and had reasonable necessity for a private road to gain access to a public right of way. Mandracchia vs. Stony Creek Real Estate Corp., 609 A2nd 871, 148 Pa Commwlth 80, 1992. The individual cannot like a public entity condemn "any interest" in "any individual's" property merely to promote the public interest. Eminent Domain Code Sec. 1-303, Private Road Act 36 P.S. 2732. Under

the "Private Road Act" the individual is unable to condemn in fee simple, for any public purpose. Only in very limited circumstances can a condemnor condemn a neighbors lands; therefore, to argue the similarities of the laws in order to argue a violation of equal protection is done only by ignoring the two acts disparate purposes.

The "Private Road Act" originally drafted in the 1830's had framers who were possessed with a sense of fairness and due process. The due process contained in their drafting has been upheld by the Federal Courts. Marinclin vs. Urling, 384 Federal Reported 2d 872 (1967).

Due process within the "Private Road

Act requires a hearing to establish a need and to either confirm or relocate the proposed location. Further due process is shown where adequate safeguards were built into 36 P.S. 2731 et seq to insure any private taking is compensated:

36 P.S. 2736 provides:

> The damages sustained by the owners of the land through which any private road may pass shall be estimated in the manner provided in the case of a public road, and shall be paid by the persons..... at whose request the road was granted or laid out. Provided that no road shall be opened before the damages shall be fully paid. (emphasis added)

Hence this provision is consistent with the PA Constitution Act I, Section 10 which required compensation or security before a taking.

The Petitioner raises a concern about a condemnor walking away from the proceedings after an award of damages but before compensation is made. The drafters of the "Private Road Act" have provided the condemnee a safeguard:

> "In the event that the proceedings for the opening and laying out of a private rate...shall have been completed...and such proposed road not have been physically open upon the ground, and shall have remained or shall remain unopened to use for a continuous period of five (5) years...then such proceedings shall be deemed to be void and, of no effect, and the land to be taken shall revert to the owners of the land." 36 P.S. 2738 (emphasis added)

Section 2737 and 2738 answers the Petitioners' concern, if the condemnor walks away from the proceedings subsequent the

location and width of the right of way and consequent damages being established, thence, with time, 5 years, the right of way reverts to the underlying land owner. Furthermore, Section 2736 can be used as a legal basis to effectively enjoin any use or opening prior compensation being made.

The Petitioner also is concerned about compensation for attorney fees and experts involved in the underlying lawsuit. The adverse party responds by pointing out the underlying litigation involves private entities. The legislature can chose or not chose to allocate the expense of the lawsuit between the parties. In Pennsylvania, an individual sued for a right of way by

adverse possession, prescription or implication, is not entitled to an award of legal costs. The legislature has not stepped into to provide legal fees in those cases. Yet the defendant in those cases is put to legal expenses and the threat of a possible cloud of a right of way on its title. In our legal system, traditionally, the costs of litigation are borne by the parties, and so it should be in this matter.

CONCLUSION

The "Private Road Act" is a law giving the individual the right to take an easement for a road in only extraordinary circumstances such as when a parcel of land is landlocked. On the contrary, the "Eminent Domain Code" gives public entities broad powers to condemn anyones land for any use so long as that purpose or use is public. To equate equal protection with requiring parallel processes and procedures for both the "Private Road Act" and "Eminent Domain Code" is to ignore the limited circumstances in which the "Private Road Act" can be applied. Furthermore, due

process is alive and well in the "Private Road Act." Hearings are requested to establish need, location, width and compensation to be paid. The condemnee has full control of the property until compensation is paid. Although the procedures and process of these two dissimilar acts are different an intrinsic sense of due process can be found in both the "Private Road Act" and the "Eminent Domain Code". For these reasons the Petitioner's request for an appeal should be denied.

Respectfully submitted,

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